

04-CV-01998-M

Honorable John C. Coughenour

FILED
100310
RECEIVED

DEC 23 2004

AT SEATTLE
U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION, et
al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
INTERIOR, et al.,

Defendants.

No. 04-CV-01998

**UNOPPOSED MOTION TO INTERVENE
OF WASHINGTON FRIENDS OF FARMS
AND FORESTS, WASHINGTON STATE
POTATO COMMISSION, NATIONAL
POTATO COUNCIL, WASHINGTON
STATE FARM BUREAU, IDAHO FARM
BUREAU FEDERATION, WASHINGTON
ASSOCIATION OF WHEAT GROWERS,
WASHINGTON STATE DAIRY
FEDERATION, WESTERN
WASHINGTON GOLF COURSE
SUPERINTENDENTS ASSOCIATION,
HOP GROWERS OF WASHINGTON, AND
WASHINGTON STATE
HORTICULTURAL ASSOCIATION**

**NOTE ON MOTION CALENDAR:
January 14, 2005**

RUSSELL C. BROOKS, WSBA No. 29811
Pacific Legal Foundation
10940 NE 33rd Place, Suite 109
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
rh@pacificlegal.org

Attorney for Intervenor-Applicants

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
APPLICANTS	1
ARGUMENT	7
THE STEWARDS SATISFY RULE 24 AND SHOULD BE GRANTED INTERVENTION AS A MATTER OF RIGHT	7
A. The Stewards' Motion to Intervene Is Timely	7
B. The Stewards Possess Legally Protectable Interests in This Action	8
C. Disposition of This Case May Impair the Stewards' Interests	9
D. None of the Parties Adequately Represent the Stewards' Interests	11
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
Cases	
<i>Californians for Safe Dump Truck Transportation v. Mendonca</i> , 152 F.3d 1184 (9th Cir. 1998)	10
<i>County of Fresno v. Andrus</i> , 622 F.2d 436 (9th Cir. 1980)	8
<i>County of Orange v. Air California</i> , 799 F.2d 535 (9th Cir. 1986), <i>cert. denied</i> , <i>City of Irvine v. County of Orange</i> , 480 U.S. 946 (1987)	8
<i>Forest Conservation Council v. United States Forest Service</i> , 66 F.3d 1489 (9th Cir. 1995)	10
<i>Greene v. United States</i> , 996 F.2d 973 (9th Cir. 1993)	7
<i>Idaho Farm Bureau Federation v. Babbitt</i> , 58 F.3d 1392 (9th Cir. 1995)	7
<i>Kleissler v. United States Forest Service</i> , 157 F.3d 964 (3rd Cir. 1998)	10, 12
<i>Kootenai Tribe of Idaho v. Veneman</i> , 313 F.3d 1094 (9th Cir. 2002)	1
<i>Natural Resources Defense Council v. Costle</i> , 561 F.2d 904 (D.C. Cir. 1977)	11
<i>Natural Resources Defense Council v. EPA</i> , 99 F.R.D. 607 (D.D.C. 1983)	9, 11
<i>Ohio Forestry Association Inc. v. Sierra Club</i> , 523 U.S. 726 (1998)	12
<i>Sagebrush Rebellion, Inc. v. Watt</i> , 713 F.2d 525 (9th Cir. 1983)	11
<i>Sierra Club v. EPA</i> , 995 F.2d 1478 (9th Cir. 1993)	8
<i>Sierra Club v. Espy</i> , 18 F.3d 1202 (5th Cir. 1994)	11
<i>Smith v. Pangilinan</i> , 651 F.2d 1320 (9th Cir. 1981)	8
<i>Southwest Center for Biological Diversity v. Berg</i> , 268 F.3d 810 (9th Cir. 2001)	11-12
<i>Spangler v. Pasadena City Board of Education</i> , 552 F.2d 1326 (9th Cir. 1977)	1
<i>Trbovich v. United Mine Workers of America</i> , 404 U.S. 528 (1972)	11-12
<i>United States v. Oregon</i> , 913 F.2d 576 (9th Cir. 1990) <i>cert. denied</i> , 501 U.S. 1250 (1991)	7
<i>United States v. Stringfellow</i> , 783 F.2d 821 (9th Cir. 1986)	11

	Page
<i>Washington Toxics Coalition v. EPA</i> , Case No. C01-132C, United States District Court, Western District of Washington	2-5
Federal Statutes	
7 U.S.C. § 136a(c)(5)	9
16 U.S.C. § 1536(a)(2)	9
Federal Register	
69 Fed. Reg. 47,732 (Aug. 5, 2004)	9
Court Rules	
Fed. R. Civ. P. 24	7
Fed. R. Civ. Proc. Rule 24(a)	7
Fed. R. Civ. Proc. Rule 24(b)	1
Miscellaneous	
7C Wright, Charles Alan, Miller, Arthur R. & Kane, Mary Kay, <i>Federal Practice and Procedure</i> § 1916 (2d ed. 1986)	8

INTRODUCTION

Intervenor-Applicants Washington Friends of Farm and Forests, Washington Potato Commission, National Potato Council, Washington State Farm Bureau, Idaho Farm Bureau Federation, Washington Association of Wheat Growers, Washington State Dairy Federation, Western Washington Golf Course Superintendents Association, the Hop Growers of Washington, and the Washington State Horticultural Association (collectively, "the Stewards"), respectfully request this Court for leave to intervene on behalf of Defendants. The Stewards seek to defend against Plaintiffs' claims because Plaintiffs' suit directly affects the Stewards' significant and substantial interests. Resolving Plaintiffs' claims without the Stewards' participation will impair and impede the Stewards' ability to protect their interests, which none of the existing parties adequately represent. The Stewards fully satisfy the standard for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure.¹

The Stewards' counsel conferred with counsel for all parties in this case and determined that the Stewards' motion to intervene is unopposed.²

APPLICANTS

Washington Friends of Farms and Forests

Washington Friends of Farms and Forests (Friends) is a trade association serving as the voice for 200 members from across Washington. The Friends' members include farmers, foresters,

¹ If this Court denies the Stewards intervention as of right, the Court should grant the Stewards permission to intervene pursuant to Fed. R. Civ. P. 24(b). Rule 24(b) provides for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." The Stewards' defenses are both factually and legally tied to Plaintiffs' action. Moreover, the Stewards' intervention will not prejudice any of the existing parties or delay the proceedings and "will significantly contribute . . . to just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977).

² Plaintiffs do not oppose the Stewards' intervention consistent with Ninth Circuit precedent, provided the Stewards do not inject new issues or claims into the merits of the litigation. The Ninth Circuit allows a private party to intervene permissively in defense of a claim under the National Environmental Policy Act (NEPA), but limits intervention as of right concerning a NEPA claim to the remedy phase. See *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002). Therefore, the Stewards move to intervene as of right in all aspects of this case except the merits of Plaintiffs' NEPA claim (Count VII); alternatively, the Stewards qualify to intervene permissively in all aspects of this case.

1 commodity groups, lawn and tree care companies, food processors, golf courses, and dealers of pest
2 control products and applicators. The Friends participated as a defendant-intervenor before this
3 Court in previous litigation concerning pest control products. *Washington Toxics Coalition v. EPA*,
4 No. C01-132C. Regulation of pest management products affect the Friends' ability to access and
5 use the tools they need to protect their crops and business and otherwise negatively impact the
6 Friends' members. The Friends' members worry that Plaintiffs' lawsuit will limit the availability
7 of pest control products, especially for minor crops and minor uses in Washington. Plaintiffs'
8 lawsuit directly impacts users of pest control products because their livelihoods depend on the
9 ability to utilize the benefits of specific pest control products intended to protect crop production
10 and promote landscape maintenance. The Friends' members are concerned Defendants do not fully
11 understand the intricacies of pest management for minor crops and minor uses, and thus will not
12 adequately represent the Friends' interests.

13 **Washington State Potato Commission**

14 Established in 1956, the Washington State Potato Commission (Potato Commission) is an
15 agency of the state of Washington assisting all Washington potato growers with marketing,
16 production, and regulatory issues affecting their interests. The Potato Commission serves
17 Washington's 300 potato growers by facilitating the awareness and value of Washington potatoes.
18 With an annual budget of approximately \$3 million, the Potato Commission and its members work
19 to benefit all Washington potato growers where their interests are significantly affected by
20 regulations, legislation, rulemaking, or litigation.

21 Washington state potatoes feed millions of people around the globe. Cultivating the most
22 productive potato fields in the world, Washington potato growers take advantage of ideal soil and
23 weather conditions to produce 20 percent of the United States potato crop. Washington's 165,000
24 acres of potatoes produce a crop that is shipped nationwide by truck and rail, and around the world
25 through Washington's world-class deep-water ports. Washington ranks second in the nation in
26 potato production, and potatoes alternate with wheat as Washington's second largest agricultural
27 crop. Thousands of Washington jobs rely on potato planting, harvesting, packing, processing, and
28 transportation. Economists estimate the annual economic impact of Washington potato production,

1 packing, and processing at approximately \$3 billion, making potatoes one of the most important
2 value-added agricultural commodities in the state.

3 Washington potato farmers are among the nation's leaders in adopting Integrated Pest
4 Management and other sustainable crop management practices that reduce pesticide use while
5 maintaining or enhancing productivity. Washington potato growers rely on many farming practices
6 to keep their farms healthy and their yields high. For example, Washington potato farmers use and
7 rely on crop protection products only when and where necessary; utilize disease-resistant potato
8 varieties to reduce reliance on crop protection products; rely on timely weather data to schedule
9 crop protection products; and rotate crops and crop protection products to promote soil health.
10 Washington potato growers understand that they are stewards of precious resources—the rich soils
11 and clean waters of the Pacific Northwest—and understand what it takes to protect and preserve
12 those resources and pass along a strong tradition of stewardship to future generations.

13 The Potato Commission participated as a defendant-intervenor before this Court in previous
14 litigation concerning application of pest control products. *Washington Toxics Coalition v. EPA*,
15 No. C01-132C. The Potato Commission has a significant interest in the counterpart regulations
16 in that they provide an effective and efficient mechanism for achieving Endangered Species Act
17 (ESA) compliance for pest control products registered under the Federal Insecticide, Fungicide, and
18 Rodenticide Act (FIFRA). The counterpart regulations will be applied to many FIFRA registrations
19 for pesticides which Washington's potato growers use currently.

20 **National Potato Council**

21 The National Potato Council (Potato Council) is the only trade association representing
22 commercial growers in all 50 states. The Potato Council's growers produce a variety of both seed
23 potatoes and potatoes for consumption. Annual production in 2001 was 444,766,000 cwt. with a
24 farm value of \$2.9 billion. The retail value of raw potatoes and the various forms of processed or
25 prepared potatoes is, of course, considerably greater.

26 The Potato Council participated as a defendant-intervenor before this Court in previous
27 litigation concerning application of pest control products. *Washington Toxics Coalition v. EPA*,
28 No. C01-132C. The Potato Council's growers need, apply, and rely on available and effective tools

1 to control pests and diseases. The Potato Council supports reasonable regulation of risks and
2 benefits of pest management product use, including regulations to assure compliance with the ESA.
3 However, the Potato Council asserts the regulations must be sensible and produce results without
4 protracted delays that endanger the availability of crop protection tools. The Potato Council
5 believes the recently issued counterpart regulations providing for a modified consultation program
6 for pesticides is a sensible step that will improve the federal government's ability to implement the
7 ESA in a timely and coordinated manner. The Potato Council favors the increased role for EPA
8 in the consultation process that the regulations provide. The Potato Council commented in support
9 of the proposed rule that led to the final counterpart regulations. It is of vital interest to the Potato
10 Council's growers that these regulations remain in place and be implemented in a timely manner.

11 **Washington State Farm Bureau and Idaho Farm Bureau Federation**

12 Washington State Farm Bureau (Washington Farmers) is an agricultural organization with
13 nearly 35,000 member families dedicated to representing the interests of farmers, ranchers, and
14 others in the agriculture industry throughout Washington. Washington Farmers rely on many tools
15 including beneficial use of pest control products to grow two million acres of food and other farm
16 products that help feed the world. The impact of agriculture on Washington's economy is over \$26
17 billion annually. Washington Farmers participated as a defendant-intervenor before this Court in
18 previous litigation concerning application of pest control products. *Washington Toxics Coalition*
19 *v. EPA*, No. C01-132C.

20 The Idaho Farm Bureau Federation (Idaho Farmers) represents the social, economic, and
21 educational interests of over 61,000 members' families in Idaho. Idaho Farmers was founded in
22 1939 and is the largest agricultural organization in Idaho. Idaho Farmers own timberlands, farms,
23 ranches, dairies, and various small businesses dependent on natural resources.

24 Washington Farmers and Idaho Farmers (collectively, "the Farmers") have a significant
25 interest in responsible and beneficial use of pest management products, especially for minor crops
26 and minor uses, since a large percentage of the crops the Farmers produce are minor crops. The
27 Farmers use and rely on pest control products and fear Plaintiffs' lawsuit will limit the availability
28 of such beneficial products, thus threatening the viability of agricultural livelihoods. Because the

1 Farmers actually use pest management products, the Defendants will not adequately represent the
2 Farmers' interests. The loss or even a reduction of the Farmers' ability to beneficially use pest
3 control products would leave the Farmers, businesses, and rural communities destitute.

4 **Washington Association of Wheat Growers**

5 The Washington Association of Wheat Growers (Wheat Growers) is a non-profit grassroots
6 organization made up of wheat growers. Since 1954, the Wheat Growers have enriched the wheat
7 industry by solving problems of the farm and rural community. The Wheat Growers participated
8 as a defendant-intervenor before this Court in previous litigation concerning pest control products
9 application. *Washington Toxics Coalition v. EPA*, No. C01-132C.

10 Wheat growers use and depend on pest management products to control weeds, insects, and
11 diseases that threaten crops. The majority of Washington wheat is exported and foreign buyers
12 demand high standards and pest-free wheat. Any slow down in the pesticide registration process
13 would negatively impact pest control practices for Washington wheat and directly cut into growers'
14 viability. Although the Departments of Interior and Commerce have been valuable partners in
15 developing conservation and habitat enhancement projects, it is not their role to fully comprehend
16 the intricacies of pest management in wheat fields. The Wheat Growers are concerned that without
17 direct grower input, grower needs and concerns will not be adequately addressed.

18 **Washington State Dairy Federation**

19 The Washington State Dairy Federation (Dairy Federation) was formed in 1892 by dairy
20 farmers concerned about regulatory activity. Today the Dairy Federation continues to represent
21 Washington's 600 dairy producers. The Dairy Federation is the legislative and regulatory
22 monitoring arm for the dairy industry in Washington. The Dairy Federation's responsibilities
23 include working with state and federal regulatory agencies and state officials to promote the
24 interests of dairy producers in the state of Washington.

25 The Dairy Federation relies on available and effective tools to control pests and diseases.
26 The Dairy Federation supports reasonable regulation of risks and benefits of pest control product
27 use, including regulations that comply with the ESA. The Dairy Federation contends the
28 counterpart regulations are a sensible step that will improve the federal government's ability to

1 implement the ESA in an effective manner. The Dairy Federation favors the increased role for
2 EPA in the consultation process that the regulations provide. It is of vital interest to the Dairy
3 Federation that these regulations remain in place.

4 **Western Washington Golf Course Superintendents Association**

5 The Western Washington Golf Course Superintendents Association (Golf Course
6 Association) is a non-profit entity consisting of golf course superintendents and industry
7 professionals throughout Washington. The association currently has 368 members representing
8 over 100 golf courses in Washington.

9 It is critical that golf course maintenance operations have the ability to control the many
10 insect pests, weeds, and fungal diseases that affect turfgrass. The safe and reasonable use of crop
11 protectants is needed to produce high quality playing conditions, particularly on putting green turf.
12 If the turf management industry were to lose the ability to use key products, it would be unable to
13 continue producing high quality playing conditions or growing turf at the current mowing heights.

14 **Hop Growers of Washington**

15 Hop Growers of Washington (Hop Growers) is a non-profit organization representing hop
16 producers in Washington. Because Washington's entire production of hops (70 percent of the
17 United States' supply and 20 percent of the world's production) is grown in the Yakima Valley,
18 ESA regulation directly impact on our producers.

19 The United States' hop industry has an aggressive plant protection research and registration
20 program and relies heavily on EPA's ability to issue timely registrations for new plant protection
21 products. Hops, a perennial crop, is highly susceptible to several serious pests and diseases, and
22 nonpesticide tools often offer limited effectiveness in a monoculture system. Due to the potential
23 for resistance development to existing registered products, it is important to bring new modes of
24 action into usage on a regular basis to allow the lifespan of chemicals to be maximized. In sum,
25 time is of the essence.

26 **Washington State Horticultural Association**

27 The Washington State Horticultural Association is a nonprofit organization that represents
28 nearly 3,000 tree fruit producers in Washington. The industry produces high quality tree fruit

1 products including apples, pears, and cherries. Products are shipped to all 50 states in the United
2 States and to dozens of foreign countries. Domestic and global consumers demand tree fruit
3 products free of pests and diseases. As a result, Association is very interested and concerned with
4 the availability of safe and effective crop protection materials. Without access to adequate crop
5 protection materials to effectively combat pests and diseases, tree fruit producers would suffer
6 economically due to crop and market losses. The industry needs a reliable regulatory process to
7 ensure access to a broad array of crop protections tools that are safe and effective.

8 ARGUMENT

9 THE STEWARDS SATISFY RULE 24 AND SHOULD 10 BE GRANTED INTERVENTION AS A MATTER OF RIGHT

11 Rule 24(a) of the Federal Rules of Civil Procedure provides:

12 [u]pon timely application anyone shall be permitted to intervene in an action . . .
13 when the applicant claims an interest relating to the property or transaction which
14 is the subject of the action and the applicant is so situated that the disposition of the
15 action may as a practical matter impair or impede the applicant's ability to protect
that interest, unless the applicant's interest is adequately represented by existing
parties.

16 Rule 24 "is construed broadly in favor of the applicants." *Idaho Farm Bureau Federation v.*
17 *Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995).

18 The Ninth Circuit developed a four-part test in analyzing Rule 24(a). Under the test, in
19 order to qualify for intervention as of right, an applicant must meet the following requirements: (1)
20 timeliness, (2) an interest relating to the subject of the action, (3) practical impairment of the
21 party's ability to protect that interest, and (4) inadequate representation by the parties to the action.
22 *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). Practical considerations guide
23 application of the test. "If an [applicant] would be substantially affected in a practical sense by the
24 determination made in an action, he should, as a general rule, be entitled to intervene[.]" Fed. R.
25 Civ. P. 24, Advisory Committee's Note. The Stewards satisfy each element.

26 A. The Stewards' Motion to Intervene Is Timely

27 If a motion to intervene is filed prior to judgment, courts examine four factors to determine
28 timeliness: (1) the stage of the proceedings; (2) prejudice to the existing parties; and (3) the reason

1 for and length of any delay. *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986),
2 *cert. denied*, *City of Irvine v. County of Orange*, 480 U.S. 946 (1987).

3 This case is at an early stage, and there has been no delay in intervening. Plaintiffs filed
4 their complaint on September 23, 2004, and Defendants recently filed their answer, on November
5 23, 2004. No substantive motions have been filed. *See* 7C Charles Alan Wright, et al., *Federal*
6 *Practice and Procedure* § 1916, at 435-39 (2d ed. 1986) (a motion to intervene “made before the
7 existing parties have joined issue in the pleadings has been regarded as clearly timely”). The initial
8 status conference took place on December 14, 2004, after which the parties stipulated to a briefing
9 schedule, by which the Stewards will abide. *See* Docket at 25. Finally, the Stewards’ intervention
10 at this early stage of the litigation will not prejudice any party in any way. Given the Stewards’
11 timely request and the lack of prejudice to the existing parties, the motion to intervene is timely.

12 **B. The Stewards Possess Legally Protectable Interests in This Action**

13 Rule 24(a) requires an applicant to possess an interest relating to the subject matter of the
14 litigation. This “interest test” is not a rigid standard, but a “practical guide to disposing of lawsuits
15 by involving as many apparently concerned persons as is compatible with efficiency and due
16 process.” *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). A proposed intervenor
17 need not have a specific legal or equitable interest in jeopardy but need only show a “‘protectable
18 interest’ . . . of sufficient magnitude to warrant inclusion in the action.” *Smith v. Pangilinan*, 651
19 F.2d 1320, 1324 (9th Cir. 1981). The interest test is interpreted flexibly and “broadly, in favor of
20 the applicants for intervention.” *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993).

21 The “subject of this action” is a set of regulations designed to facilitate compliance with the
22 ESA in registering pest control products under FIFRA. The Stewards are users of pest control
23 products and those who rely on users of pest control products. Accordingly, they possess
24 self-evident interests in the efficient and proper approval and registration of pest control products.

25 In a similar case, the District Court for the District of Columbia found that parties akin to
26 the Stewards possess qualifying interests in suits challenging registration of pest control products:

27 Plaintiffs’ complaint challenges procedures pursuant to which EPA reached
28 preliminary decisions that the intervenors’ pesticide products merited continued
registration. If plaintiffs succeed in this case, these regulatory decisions, which are

1 obviously in the intervenors' interest, will be set aside. Thus, the intervenors can
2 be said to have a substantial and direct interest in the subject of this litigation.

3 *Natural Resources Defense Council v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983). Similarly, the
4 Stewards have substantial and direct interests in this action that meet the Rule 24(a)(2) standard.

5 Use of pest control products is an integral part of agriculture due to the need to control
6 pests, fungus, and noxious weeds with a variety of products. For example, a fungus can become
7 resistant to a single fungicide. Not all pest control products will be used during a single season,
8 but the ability to rotate and/or treat a specific strain of fungus with the appropriate fungicide is
9 necessary to properly and effectively raise crops. Failure to use necessary pest management
10 products on farmland will harbor the pests and fungus and disease and spread it to the rest of the
11 crop, thereby destroying the entire crop. Accordingly, ensuring the continued availability of the
12 FIFRA registered pest control products is essential to the Stewards' long term viability.

13 **C. Disposition of This Case May Impair the Stewards' Interests**

14 Most of the Stewards' members use pest management products to protect their crops and
15 others own businesses that depend on FIFRA registration to enable them to market pest control
16 products and other crop protection products. The Service's joint counterpart regulations enhance
17 ESA compliance for FIFRA actions by "avoid[ing] unnecessary burdens on pesticide users with
18 no sacrifice to the protection of listed species." 69 Fed. Reg. 47,732, 47,736 (Aug. 5, 2004).

19 The generic consultation regulations the Service issued in 1986 have proven inadequate
20 within the FIFRA registration process for numerous reasons: the disparity between the extremely
21 broad FIFRA registrations and the far narrower geographical scope of most federal agency actions
22 that undergo standard ESA section 7 consultation; the EPA's high volume of decisions made each
23 year concerning pest control products; and the redundant burden of requiring manufacturers of pest
24 control products first to prove the product complies with FIFRA (no "unreasonable adverse effects
25 on the environment," 7 U.S.C. § 136a(c)(5)), only to then have to prove that registering the product
26 will not violate the ESA "jeopardy" standard (16 U.S.C. § 1536(a)(2)). See 69 Fed. Reg. at
27 47,735-36. The counterpart regulations address these inadequacies by fine-tuning the section 7
28 consultation process in order to utilize efficiently the significant scientific information EPA has

1 developed under FIFRA in evaluating any potential hazards of using pest control products.

2 Thus, the Stewards' interests in this challenge to the counterpart regulations are
3 straightforward and significant. The counterpart regulations provide improvements to a process
4 fraught with inefficient regulatory overkill that harms the Stewards. If Plaintiffs successfully
5 invalidate the counterpart regulations, the Stewards will again suffer under generic, ill-designed
6 regulations. Such a scenario harms the Stewards merely by virtue of regulatory overkill and
7 associated high costs, but also by the possibility that, under lesser regulations, use of
8 environmentally safe pest control products could be needlessly restricted. Because the Stewards
9 use pest control products subject to EPA product registrations addressed by the joint counterpart
10 regulations, the Court should grant the Stewards intervention. *See, e.g., Kleissler v. United States*
11 *Forest Service*, 157 F.3d 964, 972-73 (3d Cir. 1998).

12 The Stewards' business interests in selling pest control products also provide sufficient
13 interests for intervention of right.³ Just as "[t]imber companies have direct and substantial interests
14 in a lawsuit aimed at halting logging or, at a minimum, reducing the efficiency of their method of
15 timbercutting," *Kleissler*, 157 F.3d at 972, users and sellers of pest control products likewise
16 possess discrete and substantial interests in this lawsuit.

17 Finally, due process suggests that all parties affected by the counterpart regulations should
18 be heard—the Services, which issued and will implement the regulations; the Plaintiffs, who
19 challenge them; and the affected users, who would bear the burden of an order in Plaintiffs' favor.
20 *See Kleissler*, 157 F.3d at 971 (in cases involving private, public, and government interests, "[r]igid
21 roles [barring intervention] contravene a major promise of intervention—the protection of third
22 parties affected by pending litigation. Evenhandedness is of paramount importance.").

23 ///

24 ³ *See, e.g., Californians for Safe Dump Truck Transportation v. Mendonca*, 152 F.3d 1184, 1190
25 (9th Cir. 1998) (employees with economic interest in higher wages granted intervention of right
26 in a case that could limit wages); *Kleissler*, 157 F.3d at 973 (intervenor's interest in future United
27 States Forest Service timber sales contracts, in furtherance of statutory timber production purpose
28 of National Forests, is "substantial interest, directly related to and threatened by" lawsuit
challenging timber sale projects, and "meets the requirements of Rule 24(a)"); *Forest Conservation*
Council v. United States Forest Service, 66 F.3d 1489, 1499 & n.11 (9th Cir. 1995) (timber
industry granted intervention of right in suit challenging timber harvesting).

1 The Stewards easily meet the third requirement for intervention as of right. Plaintiffs filed
2 their complaint in order to invalidate the counterpart regulations. Should the Plaintiffs succeed,
3 the Stewards' interests in using pest management products would suffer as a direct result.

4 **D. None of the Parties Adequately Represent the Stewards' Interests**

5 Finally, an applicant must show the existing parties may not adequately represent its
6 interests. See *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983). An applicant
7 satisfies this requirement upon showing representation of its interests "may be" inadequate.
8 *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). "The burden of
9 making this showing should be treated as minimal." *Id.*; see also *Southwest Center for Biological*
10 *Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) ("[T]he focus should be the 'subject of the
11 action,' not just the particular issues before the court at the time of the motion."). Of course,
12 Plaintiffs seek to invalidate the counterpart regulations—regulations the Stewards support—and
13 thus indisputably do not represent the Stewards' interests. See *United States v. Stringfellow*, 783
14 F.2d 821, 828 (9th Cir. 1986) (adverse party cannot adequately represent applicant's interests).

15 Defendants and the Stewards share a basic interest of defending the counterpart regulations
16 to ensure they withstand challenge. But this basic interest "does not necessarily ensure agreement
17 in all particular respects about what the law requires." *Natural Resources Defense Council v.*
18 *Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (allowing industry to intervene in environmental
19 organization's suit against EPA). Beyond this very basic interest, Defendants "may not" adequately
20 represent the Stewards' other substantial interests for several reasons.

21 First, the Stewards have a stronger interest than Defendants in protecting the economic and
22 other interests of users and sellers of pest control products actually engaged in or related to crop
23 protection. Although government must represent the broad public interest, the Stewards' members
24 possess legitimate concerns regarding the well-being of their farms, ranches, land, and businesses.
25 See *Trbovich*, 404 U.S. at 538-39; *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994).

26 Second, Defendants have an institutional, but not an "on-the-ground," stake in opposing
27 Plaintiffs' attempt to invalidate the counterpart regulations. Should settlement negotiations begin,
28 Defendants and the Stewards likely would have different perspectives. Defendants cannot

1 adequately represent the "public interest" in ESA implementation concerning their regulations *and*,
2 at the same time, represent the Stewards' interests against unjustified and unnecessary restrictions
3 on pest control product use and registration. *See Trbovich*, 404 U.S. at 539; *see also Kleissler*, 157
4 F.3d at 973-74 ("The straightforward business interests asserted by intervenors here may become
5 lost in the thicket of sometimes inconsistent governmental policies.").

6 Third, Defendants may well take different positions than the Stewards on jurisdictional,
7 merits, and remedy issues. Differences between government agency defendants and private
8 intervenors on such issues were instrumental in obtaining Supreme Court reversal of a Sixth Circuit
9 decision. *Ohio Forestry Association Inc. v. Sierra Club*, 523 U.S. 726 (1998). In that case, the
10 federal government opposed Supreme Court review of the unfavorable decision below, and it fell
11 to intervenors to petition for certiorari, which the Supreme Court granted despite government
12 opposition. As *Ohio Forestry* indicates, an affected intervenor's positions may differ from a
13 government agency's, and the intervenors' inclusion can develop the issues more completely.

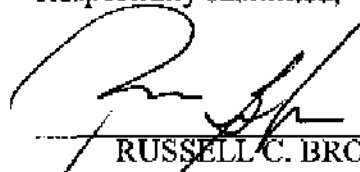
14 Finally, the Stewards will add a necessary element to this case. Intervention will ensure all
15 affected interests (environmentalists, federal agencies, and on-the-ground users and sellers of pest
16 control products) are heard, promoting fairness and a more informed decision by the Court.

17 CONCLUSION

18 "Resolution of this case will decidedly affect Applicants' legally protectable interests and
19 there is sufficient doubt about the adequacy of representation to warrant intervention." *Southwest*
20 *Center*, 268 F.3d at 824 (quotation omitted). For the reasons set forth above, the Stewards
21 respectfully request that this Court grant its motion to intervene as of right.

22 DATED: December 22, 2004.

23 Respectfully submitted,

24 
25 _____
26 RUSSELL C. BROOKS

27 Attorneys for Intervenor-Applicants
28

PACIFIC LEGAL FOUNDATION
10940 NE 33rd Place, Suite 109
Bellevue, WA 98004
(425) 576-0484 FAX (425) 576-9565

DECLARATION OF SERVICE

I, Russell C. Brooks, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd place, Suite 109, Bellevue, Washington 98004.

On December 22, 2004, true copies of UNOPPOSED MOTION TO INTERVENE OF WASHINGTON FRIENDS OF FARMS AND FORESTS, WASHINGTON STATE POTATO COMMISSION, NATIONAL POTATO COUNCIL, WASHINGTON STATE FARM BUREAU, IDAHO FARM BUREAU FEDERATION, WASHINGTON ASSOCIATION OF WHEAT GROWERS, WASHINGTON STATE DAIRY FEDERATION, WESTERN WASHINGTON GOLF COURSE SUPERINTENDENTS ASSOCIATION, HOP GROWERS OF WASHINGTON, AND WASHINGTON HORTICULTURAL ASSOCIATION and (PROPOSED) ORDER GRANTING MOTION TO INTERVENE OF WASHINGTON FRIENDS OF FARMS AND FORESTS, WASHINGTON STATE POTATO COMMISSION, NATIONAL POTATO COUNCIL, WASHINGTON STATE FARM BUREAU, IDAHO FARM BUREAU FEDERATION, WASHINGTON ASSOCIATION OF WHEAT GROWERS, WASHINGTON STATE DAIRY FEDERATION, WESTERN WASHINGTON GOLF COURSE SUPERINTENDENTS ASSOCIATION, HOP GROWERS OF WASHINGTON, AND WASHINGTON HORTICULTURAL ASSOCIATION were placed in envelopes addressed to:

James A. Maysonett
United States Department of Justice
Environment & Natural Resources Division
Ben Franklin Station, PO Box 7369
Washington, DC 20044-7309

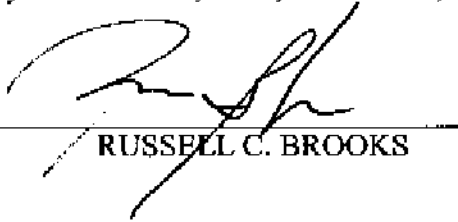
Patti Goldman
Earthjustice Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104

J. Michael Klise
Crowell & Moring
1001 Pennsylvania Avenue NW
Washington, DC 20004-2595

1 John James Leary, Jr.
2 Leary Franke Droppert
3 1500 Fourth Avenue, Suite 600
4 Seattle, WA 98101

5 which envelopes, with postage thereon fully prepaid, were then sealed and deposited in mailbox
6 regularly maintained by the United States Postal Service in Bellevue, Washington.

7 I declare under penalty of perjury that the foregoing is true and correct and that this
8 declaration was executed this 22nd day of December, 2004, at Bellevue, Washington.

9 
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
RUSSELL C. BROOKS

PACIFIC LEGAL FOUNDATION
10940 NE 33rd Place, Suite 109
Bellevue, WA 98004
(425) 576-0484 FAX (425) 576-9565